

# PUBLICATION

---

## **New Year's Resolution for Website Operators: Register Your Designated Copyright Agents in the Copyright Office's New Electronic System Before December 31, 2017 to Remain Shielded from Liability for Users' Copyright Infringements [Ober|Kaler]**

December 21, 2016

**The U.S. Copyright Office announced a new online system to designate copyright agents for online service providers under the Digital Millennium Copyright Act ("DMCA"). The online designation system replaces the former paper application system; and paper applications are no longer accepted. All agents previously designated in the old directory must re-register in the new directory before December 31, 2017, and thereafter renew agent designations every three years.**

Online service providers ("service providers" or "OSPs") are entities that provide network access and online services, including, e.g., hosting companies, mobile communication platforms, search engines, social media platforms, media sites, streaming content platforms, gaming platforms, mobile apps, and websites that post comments or materials submitted by users, risk liability for copyright infringement from third party material posted by users without the permission of the copyright owner.

### **The DMCA safe harbor is a shield against liability for copyright infringement by users**

Users who post infringing content on a website or mobile app are liable for copyright infringement. Service providers who publish infringing content posted by users online may be liable for the user's copyright infringement, unless the OSP qualifies for safe harbor protection. Since service providers seem more likely to be able to pay damages than a user, and are easier to identify, copyright owners are more likely to target the OSP if it does not have safe harbor protection. An unprotected service provider risks finding itself the sole defendant in a copyright litigation over infringing materials posted to the OSP's website by a user.

The DMCA provides a safe harbor from user copyright infringement liability in 17 U.S.C. 512(c). Qualifying service providers that meet certain requirements, described below, are extended a safe harbor from liability for such copyright infringement.

Congress passed the DMCA in 1998 to balance the rights of copyright owners with the needs of service providers in the face of rapidly developing online technology. The DMCA safe harbor protects the rapid development in online technology by providing a safe harbor from copyright infringement by content generated by users that OSPs cannot control.

Registering a designation of copyright agent at the Copyright Office is an important but often overlooked requirement to qualify for the DMCA safe harbor. The designation provides contact information for copyright owners that wish to remove infringing material from an OSP's online services. The designated copyright agent communicates with copyright owners and users and handles the DMCA notices. Having a designated copyright agent is crucial to the operation of the DMCA notice and take-down system, protecting the rights of copyright owners, and protecting OSPs from liability for copyright infringement by users on their platforms.

Failing to comply with all of the requirements of Section 512 results in the loss of a service provider's safe harbor. Once a service provider meets the Section 512(c) requirements and registers or reregisters its designation of agent, then it will qualify for safe harbor protection. However, if copyright infringement occurs when the service provider was not eligible for the safe harbor, it may be liable for such copyright infringement.

## The new directory makes it easy to update designations and maintain safe harbor eligibility

The DMCA requires the Register of Copyrights to "maintain a current directory of agents available to the public for inspection" and only extends safe harbor protection to service providers who designate an agent to receive notifications of claimed infringement by providing the agent's contact information in (i) its website terms of service and (ii) the Copyright Office directory of designated agents. The purpose of the directory is to conveniently provide information so copyright owners can efficiently contact the service provider's agent.

The Copyright Office recently determined that many service providers failed to update their agent information in the old directory, resulting in many inaccurate and out of date listings, and that a new directory system was necessary to meet the DMCA requirements. To ensure greater accuracy of the designated agent information, all new designations of agents on or after December 1, 2016 must be registered in the new online directory and service providers must maintain current and accurate information both on the service provider's website and in the new directory.

The new online directory allows service providers to easily set up an account and list their designated agents for a significantly lower fee of \$6.00 per designation. The online directory will permit service providers to amend or renew their designations for a fee of \$6.00 per designation.

## Qualifying for safe harbor protection

Service providers who desire to qualify for safe harbor protection must meet all requirements under the DMCA, including:

Displaying an appropriate copyright policy on its website;

Designating an agent to receive notifications of claimed copyright infringement on its website;

Registering the designated agent in the Copyright Office's registry system;

Maintaining accurate designated agent information on its website and in the Copyright Office's electronic directory;

Updating agent designations promptly when information changes;

Renewing agent designations at the Copyright Office every three years; and

Complying with the DMCA notice and take down procedures.

**Pro Tip:** While service providers who previously registered in the old paper-based directory have a year to re-register in the new directory, if the designated agent information for your company is no longer accurate, put registration in the new directory on your to-do list now.

## FAQ's regarding important changes under the new Copyright Office registration system

The Copyright Office modernized and updated its designated agent directory system. Some of the features have changed (mostly for the better). Here are several new features of the directory that are important to understand:

- Service providers may hire a third party to serve as account holder to manage agent designation(s) on its behalf, so long as the service provider agrees to accept the risk that it could lose the DMCA safe harbor protection if the third party account holder fails to provide accurate information, update designations, or renew designations in the directory.
- Service providers may use third parties as designated agents. This option allows service providers big or small to outsource the DMCA notice and take-down procedure. Using a third party as designated agent may allow for faster and more efficient processing of mailed notices.
- Service providers must list all names that identify the service provider, including trade names, product names, domain names, mobile app names, and other commonly used names for the service provider. The new directory accepts bulk uploads of alternate names using spreadsheets that will populate in the new directory.
- Search results will indicate whether a service provider's agent designation is "active" or "inactive".
- The old paper-based agent directory will be archived January 1, 2018 and all agent designations will be marked "inactive." Only designations made in the new directory will satisfy the statutory requirement for qualifying for safe harbor protection.
- Service providers who fail to re-register in the new online system will not be protected by the DMCA safe harbor until a new registration is made.